

A **Lee Chao Yong v Siteman Construction Sdn Bhd (in
liquidation)**

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO
W-02(NCC)(W)-1807-08 OF 2013
ABDUL AZIZ, BADARIAH SAHAMID AND PRASAD ABRAHAM JJCA
25 AUGUST 2016

C *Companies and Corporations — Winding up — Undue preference — Cheques
issued to appellant prior to winding up of respondent — Whether sum of monies
represented by cheques were monies initially advanced by appellant to respondent
— Whether respondent held monies advanced on trust — Whether payment
made void as against liquidator — Whether payment made constituted undue
preference — Companies Act 1965 ss 292 & 293*

E The appellant was a director of the respondent until he resigned on 2 October
2009. Upon winding up of the respondent, the liquidator found that prior to
the winding up of the respondent, four cheques were issued and paid personally
to the appellant in the amount of RM2,450,000. The respondent thus brought
an action against the appellant for undue preference and breach of trust as the
director of the respondent. The trial court allowed the respondent claim, hence
this appeal. The appellant submitted that the sum of monies represented by the
four cheques were monies advanced by the directors principally the appellant
to the respondent for the respondent in turn to assist the other company for the
One Menerong project. The appellant further submitted that the respondent
held the funds advanced on trust, and the payment back to the appellant by the
respondent would amount to payment to a beneficiary which would not
be caught by the provisions of s 292 of the companies Act 1965 ('the Act').

G **Held**, dismissing the appeal with costs of RM20,000 and affirming the
judgment of the High Court:

H (1) Based on the evidence, there was no resolution confirming the monies
advanced by the appellant to the respondent or these advances had been
recorded in the book account. They remained at best an unsecured loan
to the respondent by the appellant which conferred the status of an
unsecured creditor on the appellant. Thus, payment to the appellant in
the manner that it was done in this case clearly would be caught by s 293
of the Act. Further, there was no documentation in place ie the
appropriate directors' resolution to support the contention that the
respondent held the funds advanced on trust. The learned trial judge
applied the correct principle of law in coming to a conclusion that the
said payment was void as against the liquidator (see paras 16–17 & 19).

- (2) The learned trial judge was correct in holding that under all the circumstances of the case, the payments to the appellant by the respondent was with a view to prefer the appellant over other creditors bearing in mind that the appellant was the director responsible for the financial affairs of the respondent at the material time of these payments. Thus, the learned trial judge had committed no appealable errors (see para 20).

[Bahasa Malaysia summary]

Perayu adalah pengarah responden sehingga dia meletakkan jawatan pada 2 Oktober 2009. Selepas penggulangan responden, likuidator mendapati bahawa sebelum penggulangan responden, empat cek dikeluarkan dan dibayar secara peribadi kepada perayu dalam jumlah RM2,450,000. Responden oleh itu membawa tindakan terhadap perayu bagi keutamaan tak wajar dan pecah amanah sebagai pengarah responden. Mahkamah perbicaraan membenarkan tuntutan responden, maka rayuan ini. Perayu berhujah bahawa jumlah wang yang direpresentasikan oleh keempat-empat cek tersebut adalah wang yang didahulukan oleh pengarah-pengarah terutamanya perayu kepada responden bagi responden sebaliknya untuk membantu syarikat yang lagi satu bagi projek One Menerong. Perayu selanjutnya berhujah bahawa responden memegang dana yang didahulukan tersebut atas amanah, dan bayaran balik kepada perayu oleh responden merupakan bayaran kepada benefisiari yang mana tidak akan terperangkap oleh peruntukan s 292 Akta Syarikat 1965 ('Akta').

Diputuskan, menolak rayuan dengan kos sebanyak RM20,000 dan mengesahkan penghakiman Mahkamah Tinggi:

- (1) Berdasarkan keterangan, tidak terdapat resolusi yang mengesahkan wang yang didahulukan oleh perayu kepada responden atau pendahuluan ini telah direkodkan di dalam buku akau. Ia lebih baik kekal sebagai pinjaman tanpa cagaran kepada responden oleh perayu yang memberikan status pemiutang tanpa cagaran ke atas perayu. Oleh itu, bayaran kepada perayu dalam cara yang ia dilakukan dalam kes ini jelas akan terperangkap oleh s 293 Akta. Selanjutnya, tidak terdapat dokumentasi dikemukakan iaitu resolusi pengarah-pengarah yang wajar untuk menyokong hujahan bahawa responden memegang dana yang dahulukan atas amanah. Hakim perbicaraan mengguna pakai prinsip undang-undang yang betul dalam mencapai kepada kesimpulan bahawa bayaran tersebut adalah batal terhadap likuidator (lihat perenggan 16–17 & 19).
- (2) Hakim yang bijaksana adalah betul dalam memutuskan bahawa di bawah kesemua keadaan kes, bayaran kepada perayu oleh responden adalah dengan pandangan untuk memilih perayu daripada pemiutang-pemiutang yang lain mengambil kira bahawa perayu adalah pengarah bertanggungjawab bagi hal ehwal kewangan responden pada

- A masa material bayaran-bayaran ini. Oleh itu, hakim perbicaraan yang bijaksana tidak melakukan apa-apa kesilapan yang boleh dirayukan (lihat perenggan 20).]

Notes

- B For cases on undue preference, see 3(1) *Mallal's Digest* paras 2030–2035.

Cases referred to

- Asia Commercial Finance (M) Bhd v JB Precision Moulding Industries Sdn Bhd (In liquidation)* [1996] 2 MLJ 1, FC (refd)
- C *Bah Heng Hong Sdn Bhd v The Provisional Liquidator Choong Shin Cheong & Anor* [1992] 3 CLJ 1421, HC (refd)
- Lin Securities v Royal Trust Bank (Asia Limited)* [1995] 1 SLR 97; [1994] 3 SLR(R) 899, CA (refd)
- D *Silver Corridor Sdn Bhd v Gallant Acres Sdn Bhd & Anor* [2016] 5 MLJ 1, FC (refd)

Legislation referred to

- Bankruptcy Act 1967 ss 52, 53, 53(1)
- E Companies Act 1965 ss 292, 293, 329

Appeal from: Suit No 22(NCC)-291–03 of 2012 (High Court, Kula Lumpur)

- Mark Ho (Jananee Gopal with him) (Chellam Wong) for the appellant.*
- F *Patmanathan a/l Mylvaganam (Amrit Pal Singh with him) (AI Nathan) for the respondent.*

Prasad Abraham JCA:

INTRODUCTION

- G [1] We heard the appeal on 29 October 2015. Having heard the submissions of respective counsels, we dismissed the appeal with costs of RM20,000. We now deliver our grounds of judgment.

H BACKGROUND FACTS

- [2] We will refer to the respective parties as cited in the original suit. The facts are elucidated from the pleadings, judgment of the learned judge and the submissions of respective parties.

- I [3] The plaintiff is a company duly incorporated in Malaysia and is now under liquidation. The first defendant was a director of the plaintiff until he resigned on 2 October 2009. The first defendant was also one of the directors and shareholders of the second defendant and has resigned from his position as

a director in the second defendant on or about 5 March 2009. A petition for winding up of the plaintiff was presented in the Kuala Lumpur High Court (D-28NCC-18 of 2010) on 11 March 2010 and subsequently an order for the winding up of the plaintiff was granted on 11 June 2010. Mr Subramaniam a/l AV Sankar was appointed as the liquidator for the plaintiff ('the liquidator').

[4] Upon winding up of the plaintiff, the liquidator discovered that prior to the winding up of the plaintiff, five cheques were issued from the plaintiff's current account totalling in the sum of RM3,825,526.48. From these five cheques, four were paid personally to the first defendant in the amount of RM 2,450,000 and one cheque to the second defendant in the amount of RM1,375,262.48.

[5] The plaintiff claimed:

(a) against the first defendant:

- (i) a declaration that the payments made on or about the respective dates of 6 October 2009 and 8 December 2009 in the total sum of RM950,000 by the plaintiff to the first defendant are deemed fraudulent, and/or constituted an undue preference of the first defendant or voluntary settlement in favour of the first defendant, and are absolutely void or void accordingly;
- (ii) a declaration that the payments made on or 3 September 2009 in the total sum of RM1,500,000 by the plaintiff to the first defendant constituted an undue preference of the first defendant or voluntary settlement in favour of the first defendant and are absolutely void or void accordingly;
- (iii) further or alternatively a declaration that the first defendant was guilty of breach of trust in relation to the plaintiff as a director in applying on or about the respective dates of 3 September 2009, 6 October 2009 and 8 December 2009 to his own use the total sum of RM2,450,000 being part of the plaintiff's money;
- (iv) an order that the first defendant do repay to the plaintiff and/or its Liquidator the sum of RM2,450,000;
- (v) damages for breach of trust, statutory duty, fiduciary duty and/or duty of care to the plaintiff;
- (vi) aggravated damages;
- (vii) exemplary damages;
- (viii) interest at the prevailing base lending rate maintained by Malaysian Banking Bhd on the sum of RM500,000 from 3 September 2009 until the date of judgment;

- A** (ix) interest at the prevailing base lending rate maintained by Malayan Banking Bhd on the sum of RM1m from 3 September 2009 until the date of judgment;
- B** (x) interest at the prevailing base lending rate maintained by Malayan Banking Bhd on the sum of RM450,000 until the date of judgment; and
- (xi) interest at the prevailing base lending rate maintained by Malayan Banking Bhd on the sum of RM500,000 from 8 December 2009 until the date of judgment.
- C** (b) against the second defendant:
- (i) a declaration that the payment made on or about 6 February 2009 in the sum of RM1,375,262.48 by the plaintiff to the second defendant constituted an undue preference of the second defendant or voluntary settlement in favour of the second defendant and is absolutely void or void accordingly;
- D**
- (ii) further or alternatively a declaration that the second defendant is liable as a constructive trustee to the plaintiff in relation to the said total sum of RM1,375,262.48;
- E**
- (iii) an order that the second defendant do repay to the plaintiff and/or its liquidator the sum of RM1,375,262.48; and
- (iv) interest on the said sum of RM1,375,262.48 at the prevailing base lending rate by Malayan Banking Bhd from 6 February 2009 until the date of judgment.
- F**
- (c) against the first and second defendants:
- (i) interest on the judgment sum at the rate of 4%pa from the date of judgment until full and final settlement;
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- (ii) costs; and
- (iii) such further and other relief as the court may deem fit and just.
- H** [6] Briefly the first defendant raised the following defences:
- (a) the payments are bona fide payments in repayment of an advance made by the first defendant and hence for valuable consideration;
- I** (b) there was an agreement between the shareholders, directors of the plaintiff, that the defendant would advance the monies to the plaintiff as operating capital and he would be repaid as and when the plaintiff was in a positive cash flow or when there were no creditors due at that time;
- (c) the monies were repaid to the first defendant for advances for a specific purpose ie the funding of the undertaking of the project known as One

Menerong and as such, a trust was created over the said monies. Such monies were outside the assets to be distributed in the winding up and beyond the purview of s 293 of the Companies Act 1965; and

(d) therefore, the payments do not constitute undue preference.

[7] The second defendant contended that the payment to the second defendant amounting to RM1,375,262.48 was the payment for work done by the second defendant for the construction of two bungalow houses owned by Balance Mark Sdn Bhd ('Balance Mark') and Direct Task Sdn Bhd ('Direct Task'). The second defendant further averred that the plaintiff had engaged the second defendant as a subcontractor and the amount paid to the second defendant was for progress payment for the said works.

THE LAW

[8] The relevant sections that govern these payments of cheques are found in s 293 of the Companies Act 1965 and ss 52–53 of the Bankruptcy Act 1967. Both these sections of the respective Acts have been set out in extenso by the learned judge in her judgment.

[9] The position in law has been clearly set out in several cases as to the effects of these sections and we firstly refer to the case of *Bah Heng Hong Sdn Bhd v The Provisional Liquidator Choong Shin Cheong & Anor* [1992] 3 CLJ 1421 where His Lordship James Foong J (as he then was) held that in order to qualify under s 53(1) of the Bankruptcy Act 1967 and the principles are equally applicable to s 293 of the Companies Act 1965, five main conditions to be fulfilled namely:

- (a) that the transaction in question took place within six months prior to the commencement of the winding up;
- (b) that it satisfies the description of one of the type of transaction mentioned in the said section 53(1);
- (c) that the transaction took place at a time when the company was insolvent;
- (d) that the person in whose favour the transaction was effected stood in the relation of creditor of the company; and
- (e) that the effect of the transaction was to confer on that person a preference priority or advantage over other creditors in the winding up.

[10] We also make reference to the Federal Court case of *Asia Commercial Finance (M) Bhd v JB Precision Moulding Industries Sdn Bhd (In liquidation)* reported in [1996] 2 MLJ 1 at p 1 and we quote where it was held by the court:

- (2) By virtue of s 219(2) of the Companies Act, the winding up shall be deemed to

A have commenced on the date of the presentation of the winding up petition. Thus whether there was an existing debt to constitute a lien to come within the term 'secured creditor' as defined in s 2 of the Bankruptcy Act in this case, depended on whether there was any debt due to the lessor from the lessee at the time of the presentation of the winding-up petition, provided a winding-up order was made by the court. It was also essential that the debt was due from the debtor (lessee) to the creditor (lessor); *Re Perkins, ex p Mexican Santa Barbara Mining Co* (1890) 24 QBD 613 followed.

B (5) In light of the validity of the set-off by the lessor, there was no substance in the contention of the lessee that there had been undue preference in favour of the lessor under s 293 of the Companies Act rendering the set-off liable to be avoided.

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[11] We also refer to the decision of the Court of Appeal of Singapore ie *Lin Securities v Royal Trust Bank (Asia Limited)* [1995] 1 SLR 97; [1994] 3 SLR(R) 899. In this rather instructive case the Court of Appeal held and we quote from the judgment of LP Thean JA:

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[22] His Lordship then went on to illustrate the distinction between the intention whether or not to prefer and the reason that led to the formation and carrying out of that intention. He said, at pp 541–542:

E If a debtor, knowing himself to be insolvent and knowing, also, that bankruptcy is imminent, deliberately elects to pay his oldest friend or his closest relative, and to leave his other creditors unpaid or with little chance of being paid, it would appear to me to be irrelevant that he made the selection because of the love he bore for his friend or relative or because of his hopes for general but unspecified favours from them in the future. I am, therefore not prepared to accept the submission of counsel for the Society that a deliberate choice in the present case by the debtor of the Society for payment because the Society was the most important of his clients could not for that reason constitute a fraudulent preference. For if a debtor deliberately selects for payment A in preference to all his creditors, it cannot to my mind matter, in the absence of other relevant circumstances, whether A is the debtor's oldest friend, closest relative or best client. On the other hand, where a debtor owing money in all directions, has also robbed his employer's till, he may, knowing himself to be insolvent, elect to reimburse the till in order that, when the crash comes, the damaging fact of his robbery may not be discovered. Or a debtor may elect to make a particular payment under pressure of some threat or to obtain for himself some immediate and material benefit or to fulfil some particular obligation. *In these cases the reason for payment affects, essentially, the intention in making it. In the instances given, the intention, that is the real and dominant intention, will no longer be to 'prefer' (ie to pay, as it were, out of turn) but will be to avoid the detection of a criminal act; to relieve the threat; to get the benefit and postpone the evil day; or to satisfy the particular obligation. Though the question of pressure in some form or another has,*

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I in the reported cases, often been the crux of the matter, it is plain that an inference of intention to prefer may be displaced in many other ways than by showing that the debtor acted under pressure. Examples are indeed legion.

[23] The decision in *Re TW Cutts* was followed by the High Court in Singapore in

Ho Mun-Tuke Don & Anor (Liquidators of City Securities Pte) v Oslo Finans As [1990] 1 SLR 398; [1990] 1 SLR(R) 326. At p 17, the court summarised the position as follows:

From the judgment of Lord Evershed it is clear that, first, the onus is upon the person who seeks to avoid the payment to prove that the payment was made with a view to preferring the recipient over the other creditors; secondly, the word 'view' was construed as synonymous with 'intention' or 'object'; thirdly, where there is no direct evidence, it is open to the court to infer such intention from the facts, but such inference should only be drawn if it is the true and proper inference, and it will not be drawn from the mere fact that the creditor was paid when others were not, and, lastly, the intention to prefer must be the dominant or principal intention.

[24] Counsel for the appellants advanced a number of arguments in support of the contention that Lin acted 'with a view' to preferring the respondents over the other creditors. First, Lin allowed the respondents to have possession of the shares, notwithstanding that the latter had not exerted any pressure. Second, Lin's inconsistent responses to the respondents' and other banks' requests for custody of the shares showed surreptitious conduct in giving the respondents overnight custody whilst at the same time representing to the other banks that all of them would rank *pari passu* showed all the more that Lin's conduct was a deliberate choice. Fourth, once the deliberate act of a preferred payment made to a creditor in a situation of insolvency is proven, the only inference is that the payment was 'with a view' to preferring that creditor. In this respect, counsel relied on the case of *In re FP and CH Matthews Ltd (In Liquidation)* [1982] Ch 257. In that case, the company with M and his wife as the only shareholders and directors had an overdraft facility with a bank which was secured by guarantees executed by him and his wife. It ran into financial difficulties and stopped trading. The next day M paid into the bank account two cheques, as a result of which the overdrawn account was cleared, and the directors gave notice terminating the guarantee. The company then went into liquidation within the three-month period. The liquidator took out a summons seeking a declaration that the payments made to the bank were a fraudulent preference under the statutory provisions which were in *pari materia* with s 329 of the Companies Act 1965 and s 53 of the Bankruptcy Act 1967. At first instance, the judge dismissed the summons but his decision was reversed on appeal. Several findings of facts were made by the judge at first instance. First, M in paying the cheques to the bank account intended to pay off the bank ahead of other creditors. Second, the company was insolvent and M knew of the insolvency. And third, there was no pressure by the bank for payment to them. The Court of Appeal held that on these findings the clear inference to be drawn was that the payment was made with a view to giving the bank a preference over the other creditors. It should also be noted that M in fact had selfish interests to serve in making the payments. He and his wife as directors were the guarantors of the overdraft facility granted by the bank and the payment made to the bank extinguished their liability under the guarantees, and it appeared obvious that he preferred the bank over the creditors to whom they had not given any guarantee. The facts in this case were reminiscent of *Re M Kushler Ltd* [1943] 2 All ER 22. They were, however, quite different from those of the case at hand.

A [25] *In our judgment, the question, at the end of the day, is whether in all the circumstances Lin had acted 'with a view' to preferring the respondents over all the other creditors. As Lord Evershed MR said in Re T W Cutts (a bankrupt), the mere fact of a preference is not, without more, tantamount to proof that the debtor has acted 'with a view' to prefer.*

B [12] It is our view that it is important that an evaluation of the conduct of the first and second defendants could be correctly viewed by the learned judge as an attempt to prefer payments to them over other creditors.

C [13] Based on the aforesaid statements of law we now turn to the grounds of judgment of the learned judge.

D [14] The four cheques which formed the basis of the liquidator's action were illustrated in a table in the grounds of judgment of the learned judge to show how Her Ladyship viewed these payments in light of the applicable law. The first defendant maintained that these sums of money represented by the said cheques were monies advanced by the directors principally the first defendant to the plaintiff. In evidence, the first appellant had testified that these advances were made to the plaintiff for the plaintiff in turn to assist the other company for the aforesaid project.

F [15] The first defendant in his evidence, when cross-examined made it clear that these sums of moneys were advances from the first defendant and he furthered testified that the amounts are (unsecured, interest free and that they contained no fixed repayment terms).

G [16] We have perused through the evidence and can find no resolution confirming these advances or these advances have been recorded in the books of account. In our view, they remain at best an unsecured loan to the plaintiff by the first appellant which confers the status of an unsecured creditor on the first defendant. Therefore, payment to the first defendant in the manner that it was done in this case clearly would be caught by s 293 of the Companies Act 1965

H as the learned judge correctly held.

I [17] The first defendant tried to attempt to raise the question of trust and that the plaintiff holds the funds advanced on trust, and the payment back to the first defendant by the plaintiff would amount to payment to a beneficiary which would not be caught by the provisions of s 292 of the Companies Act 1965. The learned judge observed there was no documentation in place to support that contention ie the appropriate directors' resolution and therefore, (we find correctly so) rejected the contention of the plaintiff.

[18] With regards to the second defendant the chronology of events leading to the payment is now set out:

- (i) date of payment — 6 February 2009;
- (ii) date of presentation of winding up against the plaintiff — 11 March 2010;
- (iii) date of winding up of the plaintiff — 11 June 2010; and
- (iv) time period between item (i) and (ii) above = one year one month six days.

[19] The learned judge found that there had been a breach of s 52 of the Bankruptcy Act 1967 which is applicable to companies as per s 293 of the Companies Act 1965 which is in relation to winding up. We find that the learned judge applied the correct principle of law in coming to a conclusion that the said payment was void as against the liquidator. We refer to *GK Ganesan's Bankruptcy Law in Malaysia and Singapore, A Sourcebook* at p 705 and we quote:

In the Supreme Court case of *Lian Keow Sdn Bhd (In Liquidation) & Anor v Overseas Credit Finance Bhd (M) Sdn Bhd & Ors* [1988] 2 MLJ 449, Seah SCJ said:

In my opinion, s 53 of the Bankruptcy Act 1967 (as amended) is imported into a winding up proceeding of company by s 293(1) of the Companies Act 1965 which provides, inter alia, that:

Any transfer ... or other relating to property made or done by ... a company which, if it had been made or done by an individual, would in his bankruptcy under the law of bankruptcy be void or voidable shall in the event of the company being wound up be void or voidable in like manner.

In short, the rules of bankruptcy as to fraudulent preference are applied to the winding up of the company by the court by s 293(1) of the Companies Act 1965.

I think it is appropriate at this stage to refer to what Bacon VC said about the subject. Speaking of s 164 of the English Companies Act 1862 which is the forerunner of s 320 of the English Companies Act 1948 (ours is s 291 of the Companies Act 1965) in the case of *Willmott v London Celluloid Company* (1886) 31 Ch D 425 Bacon VC said at p 434:

The 164th section however, relates only to a case similar in all respects to what which would arise in bankruptcy, and the very words of the 164th section put this beyond the possibility of doubt. *This Act of Parliament dealing as it does with an insolvent company, that is, a bankrupt company, and making provision for the benefit of the creditors, of the shareholders, and of all other persons interested, declares by the 164th section that a fraudulent preference shall be set aside and held to be void for the benefit of the creditors — that is, the creditors in the winding up. No other persons have any right to raise the question of fraudulent preference ...*

A We also refer to the recent decision of the Federal Court in *Silver Corridor Sdn Bhd v Gallant Acres Sdn Bhd & Anor* [2016] 5 MLJ 1 on the point.

[20] Having evaluated all the evidences before us and before the learned judge, we find that the learned judge was correct in holding that under all the
B circumstances of the case, the payments to the first defendant by the plaintiff was with a view to prefer the first defendant over other creditors. We also bear in mind that the first defendant was the director responsible for the financial affairs of the respondent at the material time of these payments. We find the
C learned judge had committed no appealable errors and in the circumstances this appeal is dismissed and the judgment of the High Court is affirmed.

Appeal dismissed with costs of RM20,000 and judgment of High Court affirmed.

Reported by Dzulqarnain Ab Fatar

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